No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

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Statement of Basis of Jurisdiction.

This is an appeal from a judgment rendered against the appellant by the District Court of the United States for the Southern District of California, Central Division, upon a verdict finding appellant guilty of violations of U. S. C. Title 8, Sec. 746(a)(18)—falsely claiming citizenship. The charges are contained in two indictments. The first indictment (No. 20069) in count one charged a violation of said statute on or about June 21, 1947 and count three charged a violation as of May 25, 1944; the second indictment consisting of one count charged a violation as of November 1, 1945 [Indictments, R. 2, 11; Verdict, R. 34; Judgment, R. 38, 40]. The appellant was sentenced to a term of imprisonment of one year on count one of the indictment (No. 20069) and to pay a fine in the sum of

$1,000; and, on count three of said indictment, to a term of imprisonment of one year and to pay a fine in the sum of $1,000, said sentences of imprisonment to run concurrently [R. 39]; and to a term of imprisonment of one year and to pay a fine in the sum of $1,000 on indictment No. 20604, said term of imprisonment to run concurrently with the sentence of imprisonment of one year imposed in case No. 20069 [R. 40].

The District Court allegedly had jurisdiction under 28 U. S. C., Sec. 41(2) and this Court has jurisdiction under 28 U. S. C., Sec. 225(a).

Thereafter the appellant duly filed his Notice of Appeal from said judgment against him within the time prescribed by law [R. 41]; and, contemporaneously therewith, appellant filed his Designation of Grounds of Appeal [R. 42].

Thereafter, appellant filed within the time prescribed by law his Designation of Record on Appeal [R. 45], and a Statement of Points on which appellant will rely on appeal, together with a designation of the parts of the record necessary for a consideration of his appeal [R. 44].

Thereafter, the record in this case, including the transcript of all of the testimony and all of the evidence, together with all of the exhibits, separately and directly certified, was filed with the Clerk of this Honorable Court, together with a Statement of Points to be relied upon on appeal [R. 281, 283, 44].

Statement of the Case.

The Indictments.

Count one of indictment No. 20069 charged the appellant with having violated subparagraph (18) of Section 746(a) of Title 8, U. S. C., as follows:

> "On or about June 21, 1947 * * * Allen Smiley did knowingly, wilfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States."

The other count in indictment No. 20069, and indictment No. 20604, each charged the identical offense, however, in the instance of indictment No. 20069 the date alleged was May 25, 1944 and the person to whom the defendant so represented himself was J. E. Siu, a Deputy Sheriff of the County of Los Angeles, and in indictment No. 20604 the date is given as November 1, 1945 and that the representation was to the Los Angeles Police Department [R. 2, 11].

The appellant filed motions to dismiss the indictments which were denied [R. 4, 12, 48, 10].

The Facts in Evidence.

As to count one of indictment No. 20069, the record discloses that the appellant was held as a material witness for interrogation from late in the evening of June 21, 1947 to early in the morning of June 22, 1947 by the Beverly Hills Police Department; that on this occasion a police officer at the Beverly Hills Police Station made out a booking slip as a result of his interrogation of the appellant, which disclosed appellant's address, phone number, color of hair and eyes, height, weight, age, complexion, build, descent, nationality, place and date of birth, time in county, state and United States, and occupation. The slip stated that appellant was born in New York City, was in the county and state for twenty years and in the United States for life [R. 118, 157]. The Beverly Hills police officer testified the custom of the Beverly Hills Police Department was when a person was brought in for booking that the officer on duty would ask the questions contained on the booking slip of the person being booked, and filled in the answers on the slip [R. 115]. The above evidence was received over objection that it was irrelevant and immaterial [R. 117]. The above constitutes all of the evidence as to this count of the indictment.

As to the remaining count of indictment No. 20069, the record discloses that the appellant was arrested on May 25, 1944 by the Sheriff's office of Los Angeles County on suspicion of bookmaking and later released [R. 80, 88]. Deputy Sheriff Siu testified that on this occasion, appellant was taken by the Sheriff's men to an office on North Hill Street for the purpose of questioning him before taking him to the County Jail for booking [R. 85]; at this office six officers interrogated appellant for a period of

time before taking him to the County Jail [R. 86, 87]. The arresting officer made out an arrest slip containing the date of arrest, color of the subject's hair and eyes, weight and height [R. 81]; this arrest slip was then given to the booking office of the County Jail at the time the arrestee is booked [R. 82]; the purpose of the arrest slip is to identify the individual arrested and to show the charge [R. 89]. Another Deputy Sheriff [R. 121] testified that he was on duty in the booking office at the County Jail when Deputy Sheriff Siu brought in the appellant for booking; that he received the information contained on Government's Exhibit 5 from the appellant, in answer to questions put to him at that time [R. 122]; this exhibit reflects "the prisoner," Allen Smiley answered "yes" to the question "United States citizen;" that he asked the question "United States citizen" and that Smiley answered "yes" [R. 123]; that the booking slip [Government's Exhibit 5] was required by the Sheriff's office at the time he made it out. On cross-examination, the witness testified that this form had been in use for several years; that it was a form developed by the "sheriff himself" and that he was told to use that form in booking prisoners and that he did use it [R. 135]. Exhibit 5 concerning this incident was also objected to as irrelevant and immaterial [R. 136].

As to the third incident which is the subject of indictment No. 20604, the record discloses that on November 1, 1945, at three o'clock in the morning, the appellant together with many other persons was booked at the Lincoln Heights Jail on a local gambling charge, of which he was later acquitted by a jury [R. 100, 101, 113]; that it was the practice of the Police Department to obtain the information contained in Exhibit 9 from an arrestee at the time of his booking [R. 101]; that the booking in-

formation contained on Exhibit 12 [R. 106] was received from the appellant as a result of questioning him; that the answers to the questions on Exhibit 9 were copied from Exhibit 12 [R. 106, 107]; that the answer "yes" to the word "citizen" was the result of asking the appellant the question [R. 107]; that the appellant was asked his "age" and "time in county" and that he answered "age, 38" and "twenty years" [R. 107]. In answer to the question of whether or not the contents of Exhibit 9 "was required in the course of practice by the Police Department," the witness answered "It is an order, departmental order," that "it is a departmental order saying that you should get these * * * from anyone who is arrested;" that he was simply carrying out an order to get as much identification information as the prisoner would give [R. 109, 110]. On redirect examination, the witness testified, when asked what would happen to the arrestee if he would refuse to answer,—"if he refused to give any, we booked him as John Doe, gave him a booking number and held him until he does give the information" [R. 110]. On recross-examination he testified "by holding him," he means that they would put him in a cell. It was stipulated that the appellant was tried on the charge referred to in Exhibit 9 and that the jury found him not guilty [R. 109]. The objection as to materiality of this incident also was overruled [R. 113].

Aside from the foregoing, evidence relating to the existence of a policy of comity between departmental agencies in exchanging information gained from booking slips was received: The witness Cunningham testified that "As an adjunct to our finger print card furnishing additional information so that we can in the future identify a per-

son was the purpose of Exhibit 9; the information is indexed in various forms * * *." [R. 97.] Over objection that the same was immaterial, the witness testified "that the record was available to other law enforcement agencies" [R. 97] "and that it would include the Immigration and Naturalization Service of the United States."

The witness Hood testified that he was generally familiar with the use that the Federal Bureau of Investigation made of identification material and information taken from prisoners at various police stations and Sheriff's offices [R. 137]. Over objection that it was irrevelant and immaterial, the witness testified that they use such information in seeking to apprehend fugitives and others for "whom we have process out for or wish to locate." Questioned as to whether or not the information regarding nationality or citizenship was used by the Bureau, the witness answered "It might well be in some instances. It is a pertinent part of the identification record, the same as a man's age or his height or his weight * * *" [R. 138]. Asked if the Bureau referred information concerning the arrestee to the Immigration and Naturalization Service, the witness testified "In connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact" [R. 139]; that it is necessary frequently in making a referral to the Immigration and Naturalization Service, because of a similarity of names, to give the complete summary on the identification card [R. 140]. The above testimony was given over objection that it was immaterial. On cross-examination the witness testified that the Immigration and Naturalization Service had its "own immigration records," with reference to identification [R. 140] and that they are

available to the Federal Bureau of Investigation. That if they were interested in ascertaining whether one was an alien, they would check the records of the Immigration and Naturalization Service; that in investigating a person, they would first check their own F. B. I. records [R. 141].

The witness Cunningham recalled testified that he was familiar with the department known as the "Record and Identification Bureau of the Los Angeles Police Department." Over objection the witness was permitted to testify that they refer information to an agency of the United States other than the F. B. I. of noncitizenship "if it is brought to our attention to the arrest report that the man is an alien or an illegal entry—we call up the Department of Immigration." [R. 143, 144.] That the only information referred to the Federal Bureau of Investigation and the State at Sacramento are the finger print cards and "only the specific charge for which he was arrested at that time" [R. 145].

The defense stipulated that the witness Dunn would testify that Government Exhibit 2 for identification (Alien Registration Application dated October 25, 1945) was signed by the appellant and that the questions contained therein were asked by the witness and the answers given by the appellant [R. 149], and that they were given under oath. This exhibit disclosed that the appellant registered as an alien, disclosing that he was born in Russia and migrated at a tender age to Canada. It was stipulated that Government's Exhibit 1 for identification and Exhibit 2 for identification be received in evidence [R. 151]; the former, a naturalization document giving information concerning the appellant's alien birth.

The witness Hamilton testified he was an immigration inspector for Los Angeles; that the appellant was taken by him to Mr. Dunn's office to execute Exhibit 2 [R. 153]; that the appellant was arrested by him under a Warrant of Deportation on or about October 1, 1945 [R. 153, 154]; on cross-examination he testified that a hearing was had on the Warrant of Deportation, at which time the appellant was given an oath to truthfully answer any and all questions propounded to him [R. 155]; that the first hearing after the service of the warrant he interrogated the appellant as to citizenship; the appellant under oath on that interrogation testified that according to information received from his parents, he was born in Russia and brought to Canada as a child and that he remained in Canada until he was about fifteen years of age; that at that time appellant testified he believed he was a naturalized citizen of Canada because of his father's naturalization [R. 155, 156]; that the naturalization service had engaged in an investigation of the appellant for probably a couple of years prior to serving the Warrant of Deportation [R. 156, 157].

The appellant stipulated that he was born in some unknown town, approximately forty years ago, in Russia, and as a baby was brought to America, disembarking in the Dominion of Canada with his parents where he remained until the age of approximately fifteen years, when he entered the United States through the port of entry at Detroit, Michigan and has since been in the United States [R. 208, 209].

No witnesses were called in behalf of the appellant in his defense; in fact not only was there no denial, but virtually an admission that in addition to being a alien,

on the occasions of his interrogation by booking officers, he was asked certain questions with reference to his birth, as testified to, and in two instances as to whether he was "a citizen," he answered "yes" [R. 251].

The Issues as Submitted to the Jury by the Court.

The Court instructed the jury in the cardinal aspects of the case as follows:

(a) "The word 'falsely" as used in the indictment as describing the representation as to citizenship * * * means * * * the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it."

(b) "The allegation in the indictment that the person to whom the false representation of citizenship was made 'had a good reason to inquire into the nationality status of the defendant' that the phrase 'good reason to inquire' " means more than any reason, or which might be deemed by such person inquiring to be a good reason; it means, as applied to this case, that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship [R. 273].

(c) That before they can convict they must further find "that the person inquiring concerning the nationality status of defendant was engaging in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration." [R. 275.]

(d) "That 'to represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States." [R. 274, 275.]

(e) That they must find for the defendant if such representation was made " 'as a mere boast' or 'jest' or to 'stop the prying of some busybody.' " [R. 274.]

(f) "That the word 'falsely' as used in this indictment suggests more than a mere untruth and includes 'perfidiously', 'treacherously' or 'with intent to defraud.' " [R. 274.]

(g) That "willfulness," as applied to this case, means that the representation of citizenship "was not only knowingly false but also given with a bad purpose, without justifiability, excuse, and without ground for believing it lawful." [R. 274.]

(h) That before they could convict the defendant they must find beyond a reasonable doubt that the representation of citizenship "was not only knowingly false and due to willfulness, but also made 'for a fraudulent purpose.' "

(i) The Court further charged that the representation of citizenship must not only be "false and due to willfulness, but also made with intent to deceive such person as to a material matter." [R. 275.]

The appellant filed a "Motion for a New Trial" and a "Motion in Arrest of Judgment" [R. 34, 35]: "That on the law and the evidence of the case, and under your Honor's instructions, the verdict is repugnant to those instructions, and not only that a Motion for a New Trial should be granted, but * * *, that a Motion in Arrest of Judgment should be entered." [R. 263.]

The Court, although denying the motions, commented at the conclusion of the arguments:

"Your motion for a New Trial has raised a debatable question in the Court's mind . . . so, in view of that fact, the Court will admit the defendant to bail pending appeal. . . ." [R. 267.]

Theory of Prosecution.

It was conceded by the prosecution that the appellant had been before the Naturalization and Immigration Service prior to the time of any of the incidents charged in the indictments and disclosed his alienage [R. 65], and the record discloses that the Naturalization and Immigration Service was fully aware of appellant's non-citizenship status prior to these incidents [R. 156]; also that as early as 1945 the appellant, under oath, had testified in a hearing conducted by the United States Naturalization and Immigration Service that he was not a citizen [R. 155], and in that year the appellant had, under oath, registered with said Service as an alien, setting forth the details of his alienage.

The theory of the prosecution was that the arrestee by failing to truthfully cooperate with a police agency in carrying out the mechanics of police administration in gathering specific types of information, could gain an advantage, *i. e.,* forsooth the interchange of this information by governmental agencies, may have resulted in incriminating the arrestee in more and further difficulties; in short, it is making an offense out of failure of an arrestee to truthfully cooperate in the execution of a policy of comity between police agencies to which the appellant was not a party [R. 187, 188, 190, 202].

It was on this precise theory that the prosecution rested its case of materiality and fraudulent purpose in its arguments to the jury [R. 225, 226, 232, 238].

We wish to point out that there was no evidence in the record showing the nature and character of the deportation charges pending against the appellant. In the absence of such showing, it can be nothing but pure speculation

that the remote information of one having been interrogated as a material witness and arrested on a local gambling charge would have been information pertinent and material to any action on the part of the Naturalization and Immigration Service. Under the immigration laws there are certain categories of charges which permit the exercise of no discretion but deportation, and in which good moral character is never an issue. Neither did the alleged changes involve elements of moral terpitude.

The Instructions Refused.

Objections and exceptions were noted to the failure of the Court to give defendant's requested instructions, No. 27 and No. 30 [R. 30, 31, 204]. These instructions deal with the principle that the defendant was under no legal requirements to answer the booking officer's question with reference to birth and citizenship.

Specifications of Error Upon Which Appellant Will Rely.

Error I:

The Court erred at the conclusion of all of the evidence in the case in not granting the defendant's Motion for Judgment of Acquittal and to dismiss on the grounds that the evidence was insufficient to establish the offense charged as to each count of Indictment No. 20069 and Indictment No. 20604 [R. 44, 162, 204].

Error II:

The Court erred in not arresting judgment and in pronouncing judgment and imposing sentence, in that the verdict of conviction was inconsistent with, contrary and repugnant to the Court's instructions [R. 45, 271, 273-275].

Error III:

The Court erred in failing to give to the jury Instructions No. 27 and No. 30 requested by the appellant, which were:

INSTRUCTION No. 27.

"Testimony has been received that the defendant on one occasion was interviewed by city police officers of Beverly Hills, California, during the course of an investigation into the commission of an offense against the State of California. Also testimony has been received concerning routine interrogation of the defendant by municipal and county police officers at the time of his arrest and routine booking for violation of local gambling laws. Statements made by the defendant on those occasions were not made in the course of any judicial proceedings or under oath. The questions asked concerning his citizenship were all immaterial to the particular investigation and charges, and the defendant was not under any legal requirements to answer such questions." [R. 30.]

INSTRUCTION No. 30.

"Inquiry by a city or county police officer in connection with the arrest of an individual for an alleged violation of gambling laws as to the place of such individual's birth or citizenship does not impose upon such individual any legal obligation to answer such question truthfully." [R. 31.]

The grounds of the exception to the Court's failure to give these instructions were that the jury should be instructed upon the principles of law contained therein; namely, that the appellant therein at the time of being detained as a material witness or arrested for an alleged violation of

local gambling laws was not required to answer questions propounded to him by local police officers as to his birth or citizenship; or under any legal obligation to answer such questions truthfully [R. 205].

Error IV:

The Court erred in permitting testimony concerning the comity arrangements between police agencies in exchanging information concerning arrestees.

The witness, Frank Cunningham, testified that Plaintiff's Exhibit 9, a booking slip of the Los Angeles Police Department relating to the arrest of the appellant on November 1, 1945, on an alleged gambling charge, contained information as to the appellant's age, birth and citizenship [R. 97]:

> "Q. Was that record available to any other law enforcement agencies than the Los Angeles Police Department? A. Yes.
>
> Mr. Christensen: I object to that. It is irrelevant and immaterial, your Honor.
>
> The Court: I think he may answer.
>
> The Witness: Our records are open to all bona fide law enforcement agencies.
>
> Q. (By Mr. Tolin): Would that include the Immigration and Naturalization Service of the United States? A. Yes, sir, it does." [R. 97-98.]

The witness, Richard B. Hood, in charge of the Los Angeles office of the Federal Bureau of Investigation, testified:

> "Q. Are you familiar with the use that the Federal Bureau of Investigation makes of identification material and information taken from prisoners in

various police stations, sheriffs' offices, and the like? A. Generally, yes.

Q. Will you tell us what that use is?

Mr. Christensen: Just a moment, Mr. Hood.

To that, I object, your Honor. It is irrelevant and immaterial, whether they make use of that or they make use of Gallup polls * * *. The question is in this case whether or not he affirmatively made a representation of citizenship that defrauded someone * * * They may gather their information from high and wide, your Honor, and that will not show materiality in this case. It must grow out of the very essence of the thing that was being inquired into at that time, and not because of collateral reasons.

The Court: He may answer.

The Witness: From the information obtained on criminal finger print cards submitted to the Bureau by various law-enforcement agencies, we may from time to time prepare identification orders, we may on direct inquiry from a law-enforcement agency furnish them complete or summary bits of information from those identification cards if they ask it. We use it ourselves for seeking the apprehension of fugitives and others whom we have process out for or wish to locate.

Q. (By Mr. Tolin): Is the information regarding the nationality or citizenship of a subject who is reported on one of those cards used by your Bureau in the way in which you have described?

Mr. Christensen: Just a moment. I make the same objection, your Honor, and also the further objection that it is highly prejudicial.

The Court: He may answer.

The Witness: It might well be in some instances. It is a pertinent part of the identification record, the

same as a man's age or his height or his weight. Frequently it would be of tremendous value to an investigating officer if he had that information. That is why it is on there.

Q. (By Mr. Tolin): Is there any central place in the United States that you know of where identification material concerning persons suspected of crime, arrestees, and persons prosecuted, is kept?

Mr. Christensen: The same objection, your Honor.

The Court: He may answer.

The Witness: The Bureau maintains those records in Washington, D. C., in its Identification Division. * * * [R. 137-138-139.]

Q. Do you ever determine, that is, does the Federal Bureau of Investigation ever determine, on its own motion or pursuant to law or regulation, to refer information concerning an arrestee to the Federal Bureau of Investigation? I mean to the Immigration and Naturalization Service. A. At any time in connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact.

Q. By your department? A. By our department.

Mr. Christensen: Just a moment. May I have the same objection without renewing it?

The Court: Yes.

Mr. Christensen: At this time I will make a motion to strike. Or may it appear as if the objection was made before the answer?

The Court: To all of the testimony of the witness.

Q. (By Mr. Tolin): In determining whether to make a referral to the Immigration and Naturalization Service, do you use the identification material respecting which you have testified? A. Frequently it is necessary, in view of similarity of names and other reasons, to give the complete summary on the identification card, on the fingerprint card." [R. 139, 140.]

Frank H. Cunningham was recalled as a witness and further testified:

"Q. (By Mr. Tolin): Does that department, when a person who is arrested gives information that he is not a citizen of the United States, does your bureau refer that information on to any agency of the United States . . . other than the F. B. I.?

Mr. Christensen: That is objected to as irrelevant and immaterial and for all the reasons ascribed to the testimony of Mr. Hood.

The Court: He may answer.

The Witness: Yes, we do, Mr. Tolin. If it is brought to our attention in the arrest report that the man is an alien or illegal entry, if some information comes to our attention that way, we call up the Department of Immigration. I believe Mr. Pendergast and Mr. Cole or Mr. Nelson are the men we generally contact.

Q. (By Mr. Tolin): And you give them that information? A. Yes, we do." [R. 143, 144.]

Error V:

The Court erred in overruling appellant's Motion to Dismiss Counts 1 and 3 of Indictment No. 20069 and Indictment No. 20604 [R. 10-12, 44-45, 48].

ARGUMENT.

I.

The Evidence Was Insufficient to Establish the Offenses Charged as to Each Count of Indictment No. 20069 and Indictment No. 20604.

Upon this record, the basic contentions of the appellant as to the insufficiency of the evidence are as follows:

That answers of an arrestee at the time of his routine booking on alleged charges of gambling, *i. e.,* "Birthplace. New York, N. Y.," "U. S. Citizen. Yes," [Exhibit 5, R. 122; Exhibit 9, R. 107], and answers at the time of an arrestee's routine booking while being held as a material witness in connection with a police investigation, *i. e.,* "Where Born. New York, N. Y.," "Time in U. S. A. Life" [R. 177], plus evidence of a comity arrangement between State and Federal authorities to exchange information disclosed by these booking forms, does not establish the charges in the indictments, for the reasons:

(a) ascertainment of the Arrestee's citizenship, in connection with an arrest under the above circumstances, was *not* "in furtherance" of the inquiring police officer's official authority and duty,

(b) the nationality status of the arrestee was wholly immaterial to the alleged gambling charges and his being held as a material witness,

(c) the above circumstances failed to establish that the arrestee represented himself to be a citizen of the United States, in that "to represent one's self" as a citizen as set forth in the indictment, means (and as charged by the trial court) to hold one's self forth as, and to affirmatively claim to be a citizen of the United States.

(d) that the above answers given by the arrestee under the circumstances of this case must be held to have been given to "stop the prying of some busy body,"

(e) regardless of how an arrestee answered the above questions (be he citizen or alien), he would have suffered the identical consequences of being charged with gambling violations and being held as a material witness; therefore, there was an absence of proof that the answers were "more than a mere untruth, but were given with intent to defraud,"

(f) under the above circumstances there was a complete absence of proof of "fraudulent purpose," *i. e.,* "made with intent to deceive * * * as to a material matter," as charged by the trial court.

The trial court recognized the gravity of the above contentions, when at the conclusion of the arguments for a new trial, and the imposition of sentence, on its own motion fixed bail and characterized the questions presented as debatable ones [R. 267]. There is, of course, no case in the books presenting any comparable fact situation. The cases of this circuit, as well as of the other circuits all involved the established elements of the right legally to inquire as to citizenship, materiality as to subject matter, deception as to a material subject matter and the perpetration of a fraud. The cases all show an affirmative action upon the part of the defendant to gain for himself something which he otherwise would not have if his alienage was truthfully disclosed. Examples are many, *i. e.,* liquor licenses, supporting testimony of good character in aid of admission of an alien employee, radio licenses, employment, etc. In all these cases citizenship was material to the transaction and subject matter under consideration; the end result would or could have been different,

depending upon whether the individual was alien or citizen. In the instant case that is not the situation. Whether the appellant here had answered otherwise than he did to the booking officers he would nevertheless have been arrested on the local violations or been held as a material witness; it in no wise could or would have changed his situation or that of his arrestors or their principals.

This record, of course, also disclosed that compulsion and duress is practiced to obtain answers to the questions contained on the booking forms. On this score the testimony is that if an arrestee declines to answer he is booked as a "John Doe," and incarcerated in a cell until he does answer the questions [R. 109, 110]. We of course know that answering even as to one's name and address may under some circumstances be incriminatory. It is conceivable that such questions as were contained on the booking forms as reflected by these Exhibits could be in each instance incriminatory. Incrimination is not limited to the immediate charge, but reaches to all possible types of charges. It is of course academic that no legal right exists on the part of police officers to interrogate an arrestee with a concomitant obligation on the arrestee's part to truthfully answer. Much information may be desirable to carry out police efficiency and it may even go so far as the ascertainment of religion, politics, employment, income, marriage and divorce status, etc., but there is no law which authorizes it. If anything, the law is to the contrary and protects the individual's privacy fully. The evidence also is that booking forms such as these were prepared by a superior officer and that the booking officer was "ordered" to use them. This, of course, is a far cry from being an official act "in furtherance of official authority and duty." A police agency may have all of the characteristic

curiosity of a Mr. Gallup or the other multitude of public survey agencies, and who, incidentally, have a lawful right to ask any questions and seek any information that they desire as distinguished from the legal right to ask in furtherance of official authority, but unless authorized by a law which imposes a duty on the questioned individual to answer, the rights of police agencies are no greater than those of any curiosity seeker.

The prosecution's case is not aided at all by testimony regarding practices of police agencies to exchange information contained in these booking forms. The appellant was not a party to them. The effect of untruthful answers upon a conjectural future collateral proceeding constitutes no legal basis for requiring truthful answers. Further, there is an utter absence of proof that if appellant's alienage had been disclosed it would remotely have affected any pending proceeding, conjectural future proceeding, or the exercise of any official discretion with respect thereto. As we have seen the plaintiff advanced the fantastic theory that if the naturalization and immigration service had known the appellant had been arrested for gambling or held as a material witness it might have either affected their action on the pending deportation proceeding or inspired their taking some other action against the appellant. This certainly reaches stratospheric altitudes of guesswork and speculation in the absence of any evidence in the record as to the nature and character of the deportation proceedings pending against the appellant. In the absence of any evidence on this score who is to judge how or in what manner gambling charges and being held as a material witness could be pertinent and material under any circumstances. Incidentally the record discloses that he was released on one gambling charge and tried and ac-

quitted on the other. Further, any generalization that it may have touched the subject of good character is wholly ineffective because in taking judicial notice of the immigration and naturalization laws we find many grounds of deportation in which the issue of good character is never involved; in these cases deportation is automatic and the law affirmatively denies the exercise of the specific statutory discretions vested in the Attorney General. Also both the character of charges on which appellant was arrested and the results exclude them as factors on any issue of good moral character. Of course, the naturalization and immigration service had been advised and knew of the non-citizenship status of the appellant, before and at the time of the incidents of his gambling arrests and being held as a material witness [R. 65, 153-156].

The trial court gave recognition to substantially all of the cardinal legal principles contended for by the appellant in his charge to the jury. The law of the case as given the jury by the trial court appears (*supra,* pp. 10, 11). Under the law of the case the jury's verdict was completely inconsistent and repugnant.

This Court in *U. S. v. De Pratu,* 171 F. 2d 75, 76, in a case involving the violation of the statute in question, was concerned with the following situation:

Each of the counts 1 and 2 of that indictment charged the defendant on a stated date made a false statement of citizenship in an application for a retail liquor license filed with the Montana Liquor Control Board by answering "Yes" to the question "Are you a citizen of the U. S.?", and in the 3rd count, that he made a false statement of citizenship before a board of special inquiry of the Immigration and Naturalization Service of the United States, when, as a witness, he testified that he acquired U. S. Citi-

zenship through his father's naturalization. The evidence established as to the first two counts, that he filed applications for a liquor license with the State Control Board having jurisdiction over the issuance of such licenses claiming therein that he was a citizen of the United States, and at the time of filing no one but a citizen was eligible for such a liquor license; and the supporting evidence as to the third count disclosed that the false claim of citizenship was made while he was testifying before the Immigration and Naturalization Service in aid of another alien's application for admission to this country to become an employee in defendant's business.

Of the appellant's contention that the proof did not "sufficiently show that his claims of U. S. Citizenship were material to the transactions at hand", this Court said:

> "In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority * * * Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made * * * to 'stop the prying of some busy body.' "

In the above case the question of citizenship was both material to the transactions at hand and the law gave the authority and imposed the affirmative duty upon the officer's inquiring to ascertain the citizenship status of De Pratu; and the law itself by making it a condition precedent in each of the above instances, imposed a concomitant obligation on his part to truthfully answer. Here exists not only the legal right to inquire but the duty to do so, as well as the legal obligation to answer truthfully. "A right to inquire" does not mean just a casual right to inquire; it is a right to ascertain certain facts because of its relationship to the result. The legal right

to inquire includes the right to compel an answer as well as that the answer be truthful. In the *Du Pratu* case they had the right because the result, namely the issuance of the license, or the acquisition of an alien employee depended upon the citizenship of De Pratu.

In the instant case appellant's citizenship was not "material to the transaction at hand"; he would have been arrested or held as a material witness regardless of his alienage. The law treats alien and citizen alike in the circumstances of the instant case; it makes no distinction on that ground. The deception in the *De Pratu* case affected the end result, but in the instant case it did not and could not.

In the case of *U. S. v. Achtner* (C. C. A. 2d), 144 F. 2d 49, 52, the court said:

> "Defendant had for a long time been in the employ of the Ebasco Services, Inc., a private corporation, and * * * in answer to a questionnaire of the corporation he stated that he was a citizen of the U. S. It would appear that this was a legitimate inquiry on the part of an employer at the time of the deepening national crisis * * *" (p. 52).

The court further said that,

> "the representation of citizenship must still be made to a person having some right to inquire or adequate reason to ascertain a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken * * * to stop the prying of some busy body, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus it is said that the word 'falsely,' particularly in criminal statute suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' (cases cited) or 'with intent to defraud' * * *."

A "legitimate inquiry" as used by the appellate court above implies materiality to the transaction at hand, namely: the employment or continued employment of Achtner would or could be affected by his citizenship status. Obviously the Company had a right to initiate its own security policies and exclude aliens as employees; the Company here obviously had the right to inquire as well as an adequate reason for ascertaining the defendant's citizenship since it was related to their employment practices. The result—employment, depended upon citizenship; in the instant case, arrest or detention did not depend upon citizenship. Further the circumstances of the *Achtner* case showed the false claim of citizenship was more than a mere untruth because it could or would affect employment and therefor satisfied the essential element of the charge that it was made "with intent to defraud."

In the case of *U. S. v. Tenderic* (C. C. A. 7), 152 F. 2d 3, 5, the defendant was charged with falsely representing himself to be a citizen to the Bendix Corporation; the evidence established that he did so and also that "it was the policy of the Bendix not to employ aliens." The sufficiency of the evidence was challenged and the 7th Circuit said in referring to *U. S. v. Achtner, supra,* said,

> " 'under this statute no limitation was placed upon the circumstances under which and the persons to whom the false representation was made, as long as it was for a fraudulent purpose.' We approve the conclusion and reasoning of the case."

See, also:

U. S. v. Weber, 71 Fed. Supp. 88.

II.

The Verdict Was Inconsistent With, Contrary and Repugnant to the Court's Instructions.

At pages 10, 11, *supra,* is set forth the Court's instructions on the cardinal aspects of the case. The law as given to the jury on the controlling and basic aspects of the case, was that the "false representation" as to citizenship must be made for "the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it" [R. 271], that it had to be "with intent to defraud" [R. 274], and "made for 'a fraudulent purpose,' " and " 'made with intent to deceive' such persons to whom made as to a material matter"; that the person inquiring must have a "right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship" [R. 274], that "the person inquiring concerning the nationality status of the defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration [R. 275]; that " 'to represent one's self' as a citizen, * * * means to hold one's self forth as, and to affirmatively claim to be a citizen of the United States" [R. 274, 275], and that the false representation was not made "to stop the prying of some busy body" [R. 274].

A reading of these principles of law, as given above by the trial court to the jury, under the facts of this case makes glaringly patent the inconsistency and repugnancy of the verdict of conviction.

We submit this point without further comment and upon the argument presented in the preceding point.

III.

The Court Erred in Permitting Testimony Concerning the Comity Arrangements of Public Authorities in Exchanging Information Concerning Arrestees.

The full evidence on this phase of the case is set forth at pages 15-18, *supra*. One only need read the excerpts of the Court's instructions in the previous point to demonstrate the utter immateriality of this testimony. Permitting this testimony to remain in the case furnished the foundation for the introduction of the false and highly prejudicial issue by the District Attorney that the appellant gained some advantage with the Immigration and Naturalization service of the United States.

Here are a few excerpts from the District Attorneys' argument to the jury on this testimony:

> "So this information is relayed on there, and then, if the subject arrested is an alien, it might be—I don't say in this case that it was, that Mr. Smiley had an application for citizenship, for we have *no* evidence that he ever applied, and I will not contend that he did—but it *might* be that he would have a petition pending for naturalization. How serious it is to a man who is going down there taking these examinations as to citizenship and bringing in witnesses to prove good moral character, how serious would it be for the immigration officer on that case to get a call from the Beverly Hills Police Department saying, 'We have a man here who says he is a citizen of such and such a country; he is arrested.'

"Of course it wouldn't mean that he would be denied citizenship, necessarily, but it would *alert* the Immigration and Naturalization Service to look into that fellow a little bit.

"When people are before the Immigration Service on any of the other matters, that Service has the duty of determining the right of the alien to remain in the United States. It is the office which arranges deportation matters.

"*Suppose* that that office were considering the subject of Mr. Smiley, or Mr. Smehoff's deportation, that he was a subject of inquiry here. He might be getting along famously, from his standpoint, in warding off whatever attacks are made. How embarrassing it would be if, when he went down there one day, the Immigration Inspector would say, 'Well, Smiley, the Deputy Sheriff has called up, the Los Angeles City Police Officer called up,' or, 'the Police Department of Beverly Hills has called up and said you are in trouble there, you have been arrested,' and and that is what Lieutenant Cunningham said they would do if a man answered he was an alien. But this man got the *advantage of not* having that done. * * * " [R. 224, 226].

The foregoing was in his opening argument to the jury. After referring in detail to the above testimony the District Attorney argued:

"it would have been of the greatest interest to that Department, *not in order to determine whether Smiley was an alien*, because *they already knew that* and they had him on the fire before * * * he was

> under a deportation proceeding, *perhaps* he was trying to set up his good moral character and his obedience of law, etc., in order to escape deportation * * * they would be interested in knowing that he was in trouble with the police. Officer Cunningham didn't tell them and the fact that he didn't tell them meant they didn't find out and when they didn't find out Smiley here got the advantage of not having to go down to the Immigration office for further investigation on that. He got the advantage of *not* having immigration inspectors out inquiring what was back of this charge and this trouble he was having with the police department" [R. 238, 239].

This argument, to our knowledge, is the outstanding classical example of building presumption upon presumption, speculative presumption upon speculative presumption. As we already know there is nothing in this record to show the nature and character of the deportation proceedings from which we could determine whether or not good character was at all relevant or material to any issue, and at that material in a speculative possible collateral proceeding. This false issue introduced by this testimony, if we may be guilty of indulging in a single presumption, was accountable for the verdict of conviction; because if the case had been determined by the jury on the issues as submitted to it under the law of the case by the Court, there was no alternative but to find a verdict of "not guilty." We will submit this point upon the foregoing comment and our discussion of Point I.

IV.

The Court Should Have Given to the Jury Appellant's Requested Instructions Nos. 27 and 30.

These instructions are set forth *totidem verbis,* pages 14, 15, *supra.* The contention here is that the Court should have affirmatively charged the jury upon the principles of law contained therein, namely that the questions asked concerning appellant's citizenship were immaterial to the transaction, "the transaction at hand," namely his arrest on a charge of violating local gambling laws; and that no legal obligation rested upon the appellant to answer or to answer truthfully questions concerning birth or citizenship put to him at the time of his arrest for alleged violation of gambling laws.

U. S. v. De Pratu (C. C. A. 9), 171 F. 2d 75;
U. S. v. Achtner (C. C. A. 2), 114 F. 2d 49.

In the case of *Hersh v. U. S.,* 67 F. 2d 799, 807, this Court said:

> "It is well settled in the federal court that where a correct proposition of law essential to the proper determination of the issues submitted to the jury is proposed by the defendants and the same is not given either in substance or effect, * * * the refusal to give such instruction is error. Hendrey v. U. S. (C. C. A.), 233 F. 5, 18; Colderson v. U. S. (C. C. A.), 279 F. 556."

Also, see:

U. S. v. Gold (C. C. A.), 102 F. 2d 350, 352.

The jury were entitled to know whether under the circumstances of the case the appellant was under legal obligation to answer such questions truthfully. They were also entitled to know that citizenship was immaterial to "the transaction at hand."

V.

There Was Error in Overruling Appellant's Motion to Dismiss the Indictments.

The motion to dismiss challenges the sufficiency of the indictment on the grounds that it could not be ascertained therefrom,

(a) that there was any fraudulent purpose of the defendant in making the alleged answers as to citizenship,

(b) how or in what manner the alleged representation of citizenship was fraudulent,

(c) whether any of the said persons mentioned as the persons to whom the alleged representation was made, was (1) one to whom the appellant was obligated to truthfully state the fact of citizenship, or, (2) was a person who had a legal right to inquire into, or an adequate legal reason for ascertaining the citizenship of the defendant [R. 5, 10, 12, 48, 51].

We are, of course, not unmindful of the language of this Court in the case of *U. S. v. De Pratu,* 171 F. 2d 75, that there was "no error in the trial court's refusal to dismiss * * * for failure to allege fraudulent purpose." Actually each count in the *De Pratu* case sets forth facts showing the existence of a fraudulent purpose; this Court said, nevertheless, that the statute does not "condition the outlawed offense upon the alleged existence of a fraudulent purpose in the mind of the one making false claim of citizenship." The dictum of the Court in this case would indicate that its holding here would be against our first ground of the motion to dismiss. However, we present it again for reconsideration of the Court as we desire to

preserve this point in the light of the opinions of two other courts of appeals and a district court.

U. S. v. Achtner (C. C. A. 2), 144 F. 2d 49;

U. S. v. Tenderic (C. C. A. 7), 152 F. 2d 3.

It is our view that under these latter cases an offense is not adequately charged unless facts are pleaded which show the existence of a fraudulent purpose, this being an element of the offense interpreted into the statute.

U. S. v. Cruickshank, et al., 92 U. S. 542, 23 L. Ed. 588;

U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

The further challenge to the indictments that in each instance it does not appear therefrom the persons inquiring as to the appellant's nationality status were, (1) persons to whom he was obligated to truthfully state the fact of citizenship or, (2) persons who had a legal right to inquire into, or an adequate legal reason for ascertaining his citizenship. These contentions have not been answered by this Court or any other, to our knowledge. The rules and principles of pleading laid down in *U. S. v. Cruickshank* and *U. S. v. Carll, supra,* we maintain are applicable and that the indictment is deficient.

One may under certain circumstances answer untruthfully as to his nationality status; this being the case the pleading of the offense in the language of the statute is insufficient. The rule as stated by Justice Sanborn, in *Fontana v. U. S.* (C. C. A. 8), 262 Fed. 283, 288, is pat in principle to the instant case:

> "It is an elementary rule of criminal law that when language does *not* constitute a crime if uttered under some circumstances, and *does* constitute a crime if ut-

tered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so the court can determine, and not the pleader, whether or not they constitute the crime, U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516."

The descriptive language in the indictment that the person inquiring was one 'having good reason to inquire into the nationality status of the defendant," is meaningless, because any interloper may have personal "good reason" or a business "good reason," such as a neighbor or the employee of a national survey. It must be more than a personal "good reason;" the right to inquire must be bottomed on a legal right to inquire. It means as charged by the trial court "an adequate reason or right in law in furtherance of * * * official authority and duty."

Conclusion.

It is accordingly submitted that error of a prejudicial character has been established in connection with each of the specifications relied upon; further, the Court was without jurisdiction to try and sentence this appellant.

It is submitted that the judgment should be reversed.

Respectfully submitted,

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